UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Boris A. Miksic, Plaintiff, v. Boeckermann Grafstrom Mayer, LLC, a Minnesota limited liability company, f/k/a Johnson, West & Co. P.L.C., Boeckermann Grafstrom Mayer, P.A., and Johnson West & Co. P.L.C. Defendants.	)))))))))))))	Court File No. 15-cv-00539-JRT-BRT **DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

The defendants respectfully submit this Reply Memorandum of Law in Further Support of Their Motion for Summary Judgment.

I. ARGUMENT

A. Miksic's Claims Are Time-Barred.

1. Miksic Sustained "Some Damage" When He Failed to Timely File Tax Forms.

While alleging that the defendants are applying the wrong damages trigger analysis in his Opposition Brief, Miksic is asking the Court to apply the "discovery rule" and find that he first sustained damage when he received the IRS penalty letters (i.e. the damage was first discovered). Miksic's damages trigger analysis, however, is contrary to Minnesota case law and the Tax Code. [1]

Unlike the *Anderson* case, Miksic in fact incurred "some damages" at the time certain tax forms were not timely filed. (Opp. Br. at p. 22).[2] Miksic suffered "some damage" in 2005 and could have survived a motion to dismiss at that time.

By signing the tax returns, Miksic was on constructive notice of their contents. (Moving Br. at pp. 38-39). Miksic admitted that he did not review his tax returns before signing and filing them. (*Id*. at p. 12; se*e also* pp. 8-9 (Miksic was responsible for reviewing the returns for accuracy and for filing the same)). Miksic admits that had he actually reviewed his tax forms prior to signing and filing them, he would have identified errors. (*Id*. at p. 35). In other words, because Miksic signed and filed incomplete tax returns, in which he had the non-delegable responsibility to review for accuracy, he knew that he was subjecting himself to damages on the date the required forms were not timely filed.

To illustrate, automatic penalties were levied against Miksic for his late filing of forms 3520 and 3520-A for each year they were not timely filed. (Dckt. No. 27-17). As specified in the IRS letter dated February 4, 2014, penalties were automatically levied against Miksic for not filing form 3520 when due. (*Id*. at MIKSIC 003747, 003754).[3] Specifically, 35% of the gross reportable amount of the account was the "initial penalty" assessed to Miksic. Accordingly, for the years 2005-2008, Miksic was assessed "initial penalties" for each year, totalling $408,893.10, which were triggered when he failed to file the 3520 form each year when due, beginning in 2005. (*Id*.).

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[1] For purposes of brevity, the defendants are not addressing each and every argument presented in Miksic's Opposition Brief. By not addressing each argument here, the defendants do not agree with or concede any issues presented in the Opposition Brief.

[2] *Anderson* does not apply for another reason. The *Hermann* Court of Appeals decision held that *Anderson* controlled the analysis. *Hermann v. McMenomy & Severson*, 583 N.W.2d 283, 287 (Minn. Ct. App. 1998). However, the Court of Appeal's decision was later reversed by the Minnesota Supreme Court, which, by doing so, dismissed the application of *Anderson* to the triggering of damage in a professional malpractice case.

Automatic penalties were also levied against Miksic when he failed to timely file form 3520-A for 2005-2008. (*Id*. at MIKSIC 003748-003755). As specified in the IRS letter, dated February 4, 2014, a 5% "initial penalty" penalty was automatically levied against Miksic each year for not filing form 3520-A when due, for tax years 2005-2007. (*Id*. at MIKSIC 003750, 003754).

Automatic penalties of $10,000 per year were also assessed against Miksic each year he failed to timely file form 5471, for tax years 2007-2009. (Dckt. No. 23-1, Ex. 24, page 232 of 304).

Additionally, FBAR penalties were assessed for each year the form was not timely filed. (*See* Dckt. No. 27-16). And since Miksic was found to have been aware of his FBAR reporting requirements, additional willfulness penalties were levied. (*Id*. at MIKSIC at 004247). Specifically, Miksic's "FBARs filed for [ ] 2005, and 2007 through

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[3] I.R.C. § 6677(a)(2) provides that a penalty **shall** be assessed for the returns that were not timely filed. In other words, these penalties are automatic when the proper forms are not timely filed. (Dckt. No. 27-17 at MIKSIC 003752-003754 for a detailed explanation of the penalties assessed).

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2010 years were not filed by the June 30th of the following respective years, resulting in a violation of the filing requirements." (*Id*. at MIKSIC 004246).[4]

Finally, interest started accruing on Miksic's underpaid tax the date the forms were not timely filed. *See* I.R.C. §§ 6601 and 6651. For Miksic to say that he did sustain any damage until the IRS letters were sent to him is not supported by the record and is contrary to the Tax Code.

The *Antone* case further supports this position. The issue in *Antone* related to when the plaintiff sustained "some damage," triggering the statute of limitations. Like Miksic, who argues that he first sustained damage when he received the IRS letters, the plaintiff in *Antone* argued that he first sustained damage after the court split the profits of his real estate business with his former spouse. *Antone v. Mirviss*, 720 N.W.2d 331, 336 (Minn. 2006). In other words, Miksic, like the plaintiff in *Antone*, is taking the position that he only first sustained "some damage" when he received notice that something was going to be taken from him – in this case, money for payment of the penalties. Miksic is advocating for the application of the "discovery rule," which he even admits is not the law in Minnesota.[5] (Opp. Br. at pp. 20-21).

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[4] Miksic's analysis of *Ames* as applied to this case is also incorrect as his damages were immediate after failing to timely file the respective tax forms. Like *Ames*, Miksic's failure to timely file certain tax forms resulted in "immediate" tax liability according to the applicable penalty provisions in the tax code.

[5] The *Antone* court specifically rejected this argument that the "seeds of some damage did not ripen until the dissolution of the marriage," reasoning that such a conclusion would "come very close to establishing a discovery rule." *Id.* at 338; *see also Herman v.*

For Miksic to state that he only sustained "some damage" when he received the IRS letters is not only inconsistent with the facts of this case, Minnesota case law, and the Tax Code, but applies the "discovery rule" analysis. This Court properly applies the "some damage" analysis and finds that Miksic sustained "some damage" and the statute of limitations began to run on his claims, when he failed to file the appropriate tax forms starting in 2005.

2. Defendants' Actions Were the Same Sequence of Errors, Resulting in the Continuation of Damages, and Miksic's Claims are Time-Barred.

Miksic attempts to argue that the defendants' actions were not the same sequence of errors, resulting in a continuation of damages, when his own expert agrees with the defendants. (Moving Br. at pp. 24-25). Miksic's claims are time-barred by Minn. Stat. § 541.05, subd. 1(5).

Not surprisingly, in his Opposition Brief, Miksic does not even address the fact that his own expert testified that the defendants' acts/errors were continuous for tax years 2005 through 2010, resulting in a continuation of damages for the same years. (Ex. 5, Cobb Dep., 207:9-208:7, 209:1-215:5). Miksic's criticism of *Hermann* and *Reid* is premised upon an assumption that his own expert has dismissed. (Opp. Br. at pp. 25-29). Miksic's expert states that the errors and damages were the same and continuous. *Hermann* is directly on point here as a result. Like *Hermann*, where the same tax mistake

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McMenomy & Severson, 590 N.W.2d 641, 643 (Minn. 1999). Like *Hermann*, where the plaintiff argued that the statute of limitations was not triggered until it had knowledge of the illegality of the transactions, Miksic is attempting to argue that the statute of limitations was triggered when he first learned that he failed to file certain forms pursuant to the first IRS letter, dated January 27, 2011. (Opp. Br. at pp. 22-25).

occurred year after year, the same tax forms were not timely filed year after year by Miksic. *Hermann*, 590 N.W.2d at 642-43. The failure to file certain tax forms year after year was the same mistake, resulting in the same and continuous damages, and Miksic's expert agrees. (Ex. 5, Cobb Dep., 207:9-208:7, 209:1-215:5).

Miksic attempts to distinguish the *Reid* case by noting that the tax violation in *Reid* resulted in the "same penalty" and that it instantly "attached and was irreversible." (Opp. Br. at pp. 27-28). However, the facts of this case are in line with *Reid*. Here, as noted in the IRS letters, Miksic was assessed the same violation (described as an initial penalty in the letters) for each year he failed to timely file the appropriate tax forms. (Dckt. Nos. 23-1, Ex. 24, 27-16, and 27-17). And according to the Tax Code, those penalties "attached and were irreversible" the day after the filing was required. (*Id*.). Moreover, interest started accruing on the underpaid tax on the day after the forms were due. In other words, those initial penalties and interest on the unpaid taxes were automatic, and attached on the date the forms were not timely filed.

Finally, *Bonhiver* and *Mutschler* are not instructive as these cases involve misrepresentations, employee embezzlement, and auditing issues – none of which are at issue in this lawsuit. In *Bonhiver*, the court held that the defendant could be liable for negligent misrepresentations made to the commissioner of insurance, when one of its employees was "cooking the books" to make it appear that the client was not insolvent, and where the owners of the company embezzled $2,000,000 throughout the accountant's time working for the business. Similarly, in *Mutschler*, the court found that the plaintiff's damages were ongoing because an employee embezzled funds throughout the time in which the defendants allegedly had an ongoing duty to **audit** the company's ERISA plan. These issues are not before the Court and Miksic's attempt to "cherry pick" quotes from these cases should not be given any consideration.

Based on the analysis above, this lawsuit became time barred in 2012 pursuant to Minn. Stat. § 541.05, subd. 1(5).

3. Miksic Incurred "Some Damages" When He Failed to Timely File the Required Tax Forms and any Claims Relating to the Filings Due Before November 20, 2008 are Necessarily Time-Barred.

Alternatively, if the Court were to somehow find that Miksic's claims are not time-barred in their entirety, Miksic's claims and damages relating to tax filings (or lack thereof) due before November 20, 2008 are properly time-barred.

It has already been established that Miksic sustained some damage at the time the tax forms were not timely filed. If the Court were to somehow find that each year the proper filings were not made constitute a separate act of negligence, all claims and damages relating to tax filings due before November 20, 2008 are time-barred under Minn. Stat. § 541.05, subd. 1(5). This is because Miksic's state court complaint was served upon the defendants on November 20, 2014, and applying the six-year statute of limitations means that all claims and damages relating to tax filings due before November 20, 2008 are time-barred.

B. The Second Affidavit Does Not Comply with Minn. Stat. § 542.42.

Miksic contends that Cobb's Second Affidavit complies with Minn. Stat. § 544.42 and that the defendants "conflate the requirements" of the statute. (Opp. Br. at p. 30). The defendants, however, are simply applying the statute as written. The statute provides, in relevant part, that the second affidavit must "identify each person whom the attorney expects to call as an expert witness at trial to testify with respect to the issues of **negligence, malpractice, or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion**." Minn. Stat. § 542.42, subd. 4 (emphasis added). The defendants are not "conflating" the requirements of the statute, but are simply applying the plain language to this case.

Cobb testified that he first reached his liability and causation opinions in early 2016 – several months after the Second Affidavit was served on August 17, 2015. (Ex. 5, Cobb Dep. at p. 9:5-20). Accordingly, the Second Affidavit necessarily could not have included "the substance of the facts and opinions" and "a summary of the grounds for each opinion" as Cobb had not reached his liability and causation opinions until early 2016. Moreover, Cobb's Affidavit submitted by Miksic in an attempt to cure the non-compliance with the statute should not be considered as it is contrary to his deposition testimony. *Dakota v. BWBR Architects*, 645 N.W.2d 487, 491-92 (Minn. Ct. App. 2002); *Garmac Grain Co., Inc. v. Blackley*, 932 F.2d 1563, 1568 (8th Cir. 1991).

According to Minnesota case law, the proper remedy for failing to comply with Minn. Stat. § 542.42 is dismissal of the lawsuit. (Moving Br. at pp. 29-30). *See, e.g., Afremov v. Sulloway & Hollis, PLLC*, 922 F. Supp. 2d 800, 815 (D. Minn. 2013); *Guzick v. Kimball*, 869 N.W.2d 42 (Minn. 2015).

C. Miksic's Claims are Precluded by the *In Pari Delicto* Doctrine.

For Miksic to suggest in his Opposition Brief that he was an innocent bystander and labeling the defendant's *in pari delicto* argument as "groundless," is simply disingenuous considering the facts of this case. Moreover, the cases cited by Miksic do not specifically limit the application to the situations cited therein, and the doctrine applies here in light of Miksic's conduct.

Miksic had a non-delegable duty to review his tax filings and attest to their accuracy and failed to do so. (*Id*.). Miksic, however, admitted that he never even looked at his tax filings as required. (Moving Br. at p. 34). Further, Miksic failed to disclose to the defendants critical information regarding his foreign accounts. (*Id*. at pp. 34, 36-40). He even withheld information from the defendants. (*Id*.). Had he reviewed his tax filings as required, Miksic admitted that he would have identified the mistake. (*Id*. at p. 35).

Miksic's willful misconduct, as confirmed by his own expert (*Id*. at pp. 39-40), and the IRS (Dckt. Nos. 27-16, 27-17), prevents any recovery in this action.

D. Miksic's Purported Damages Must Be Limited.[6]

1. The FBAR Penalties Are too Speculative.

What Miksic is advocating for, here, is the ability to allow for a double recovery. If the defendants were to pay the FBAR penalty and Miksic also wins his pending FBAR appeal and the penalties (or some portion of the same) are abated, Miksic would receive a double recovery. The Court has an opportunity to prevent this potential double recovery by specifically precluding recovery for the FBAR penalties that Miksic may never have to pay, pending the outcome of the appeal.

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[6] Miksic does not dispute the defendant's position that he is not entitled to recover the Form 5471 abated penalties and payment for delinquent taxes. Summary judgment is properly granted as to these damages. *Ehlers v. Siemens Medical Solutions, USA, Inc.*, 251 F.R.D. 378, 383 (D. Minn. 2008).

Miksic's reliance on the *Callihan* case is misplaced. The factual scenario in *Callihan* is patently different than the facts of this case as the *Callihan* case dealt with alleged fraud and conspiracy claims regarding the creation of a voluntary employment benefit plan under Alabama law. In addition, unlike Miksic here, the plaintiff in *Callihan* had not appealed the tax penalty and the case has not been transferred to another revenue agent for collection. The *Callihan* court was not presented with the issues of a pending appeal on a tax penalty and *Callihan* is therefore not instructive as to the proper course of action in this matter.

Accordingly, if the Court were to allow this lawsuit to go forward, the FBAR penalties are necessarily precluded from any recovery.

2. Miksic Cannot Recover His Attorneys' Fees Incurred in this Lawsuit.

Despite the black-letter-law that Miksic cannot recover his attorneys' fees associated with this lawsuit, Miksic claims that he can, citing to a general treatise and a case that is addressed directly through a case cited in the defendants' Moving Brief.

As noted in the defendants' Moving Brief, attorneys' fees are not generally included in the measure of recoverable damages for negligence and cannot be recovered by a client in a malpractice action against a professional. (Moving Br. at pp. 46-47). In fact, the very case cited by the defendants, *Whittney v. Buttrick*, 376 N.W.2d 274 (Minn. Ct. App. 1985 even cites to the very case cited by Miksic in purported support of his position that he is entitled to recover attorneys' fees incurred in this lawsuit. Specifically, the *Whittney* decision provides "appellant's claim that respondent is liable to him for attorney fees in suing respondent for legal malpractice fails in the absence of authorization by statute or case law. Attorney fees and expenses are not generally included in the measure of recoverable damages for negligence. *Hill v. Okay Constr.*, 312 Minn. 324, 252 N.W.2d 107, 121 (1977)." *Whittney*, 376 N.W.2d at 281. The treatise cited by Miksic is not law in Minnesota and Miksic cites to no Minnesota case contrary to *Whitney* or accepting the proposition cited from the treatise.

This Court therefore properly dismisses Miksic's request for attorneys' fees in connection with this lawsuit.

II. CONCLUSION

For the foregoing reasons, the defendants respectfully request that this Court grant their Motion for Summary Judgment in its entirety.

Dated: August 26, 2016.

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